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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MARTIN VAZQUEZ,
12 CDCR #D-18168,

13 Plaintiff,

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15 vs.
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18 GEORGE A. NEOTTI; SUGLISH;
19 B. KOEN; R. DAVIS; JANNUSH;
20 PAYNE; JACA; HURBERT;
21 DR. SEGAL; SANCHEZ,
22

23 Defendants.
24

Civil No. 11-2352 IEG (PCL)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [ECF No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF No. 3]; and**

**(3) SUA SPONTE DISMISSING
FIRST AMENDED COMPLAINT
FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

25 Martin Vazquez ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State
26 Prison located in Calipatria, California and proceeding pro se, has filed a civil rights action
27 filed pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28
28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant
to 28 U.S.C. § 1915(a) [ECF No. 2], along with a Motion to Appoint Counsel [ECF No. 3].

Before the Court could conduct the required sua sponte screening of Plaintiff's Complaint pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b), Plaintiff filed a First Amended Complaint ("FAC") which is permissible pursuant to Federal Rules of Civil Procedure 15(a). Accordingly, the Court will sua sponte screen Plaintiff's First Amended Complaint as it is now the operative pleading.

I.

MOTION TO PROCEED IFP [ECF No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Section 1915, as amended by the Prison Litigation Reform Act ("PLRA"), further requires that each prisoner seeking leave to proceed IFP submit a "certified copy of [his] trust fund account statement (or institutional equivalent) ... for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). Using these certified trust account statements, the Court must assess an initial payment of 20% of (a) the average monthly deposit, or (b) the average monthly balance in the account for the past six months, whichever is greater, and collect that amount as the prisoner's initial partial filing fee, unless he has no current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); *Taylor*, 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which his account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Taylor*, 281 F.3d at 847.

1 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C.
 2 § 1915(a)(1) [ECF No. 2] as well as a certified copy of his prison trust account statement
 3 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently
 4 indicates that he has insufficient funds from which to pay an initial partial filing fee.

5 Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 2],
 6 and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1) (court shall
 7 assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event
 8 shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has
 9 no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850
 10 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's
 11 IFP case based solely on a "failure to pay . . . due to the lack of funds available to him when
 12 payment is ordered."). However, Plaintiff is required to pay the full \$350 filing fee mandated
 13 by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison
 14 trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

15 II.

16 MOTION FOR APPOINTMENT OF COUNSEL [ECF No. 3]

17 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
 18 action. The Constitution provides no right to appointment of counsel in a civil case, however,
 19 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*
 20 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
 21 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
 22 be exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017
 23 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the
 24 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
 25 in light of the complexity of the legal issues involved.' Neither of these issues is dispositive and
 26 both must be viewed together before reaching a decision." *Id.* (quoting *Wilborn v. Escalderon*,
 27 789 F.2d 1328, 1331 (9th Cir. 1986)).

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1 While Plaintiff's ability to articulate his claims is limited, the Court finds, as set forth
 2 more fully below, that at this stage of the proceeding he is unlikely to find success on the merits
 3 of his claims. Thus, the Court denies Plaintiff's request without prejudice, as neither the
 4 interests of justice nor exceptional circumstances warrant appointment of counsel at this time.
 5 *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

6 III.

7 SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2) & 1915A

8 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 9 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 10 of,0 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 11 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 12 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 13 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
 14 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 15 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
 16 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 17 446 (9th Cir. 2000) (§ 1915A).

18 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 19 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
 20 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
 21 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
 22 an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of
 23 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection
 24 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
 25 that fails to state a claim."); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 26 (discussing 28 U.S.C. § 1915A).

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1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 2 allegations of material fact and must construe those facts in the light most favorable to the
 3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 5 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 6 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 7 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

8 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
 9 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
 10 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
 11 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
 12 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
 13 1350, 1354 (9th Cir. 1985) (en banc).

14 Here, Plaintiff’s claims arise from a time in which he was housed at the Richard J.
 15 Donovan Correctional Facility (“Donovan”). (*See* FAC at 1.) Plaintiff alleges that correctional
 16 officers “created a policy allowing and encouraging illegal acts.” (*Id.* at 3.) Specifically,
 17 Plaintiff alleges that while he was being escorted by Defendant Hubert to the “exercise cages,”
 18 Hubert made comments for him to fight with his cellmate and made “punching motions.” (*Id.*)
 19 Plaintiff alleges that Hubert would “make motions with body language” indicating Plaintiff
 20 should engage in a fight with his cellmate. (*Id.*) When they reached the exercise cages, Plaintiff
 21 alleges his cellmate hit him in the mouth. (*Id.*) Plaintiff alleges he was defending himself when
 22 five (5) correctional officers “excessively drench[ed]” Plaintiff and his cellmate with
 23 pepperspray. (*Id.* at 4.)

24 Based on these allegations, the Court finds that Plaintiff’s First Amended Complaint is
 25 subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2) because it fails to adequately
 26 state an Eighth Amendment claim. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The
 27 Eighth Amendment’s prohibition against cruel and unusual punishment requires that prison
 28 officials act reasonably in protecting inmates from violence suffered at the hands of other

1 prisoners. *Farmer*, 511 U.S. at 833; *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986).
2 However, to state a failure to protect claim, Plaintiff must allege facts sufficient to show that
3 Defendants were “deliberately indifferent,” that they were aware of, but nevertheless consciously
4 disregarded an excessive risk to his health or safety. *Farmer*, 511 U.S. at 834. If the official
5 is not alleged to have actual knowledge of a serious risk of harm, but is alleged to be aware of
6 facts from which the inference could be drawn that a substantial risk of serious harm exists, the
7 plaintiff must further allege that the official “also dr[ew] the inference.” *Id.* at 837; *Wilson v.*
8 *Seiter*, 501 U.S. 294, 303 (1991).

9 Here, Plaintiff alleges that he engaged in a fight with his cellmate that was instigated by
10 his cellmate. (*See* FAC at 3-4.) While he claims Defendant Huburt was encouraging Plaintiff
11 to start a fight, there are no facts from which the Court could determine whether Defendant
12 Huburt or any of the named Defendants were aware that Plaintiff’s cellmate would cause him
13 physical harm. (*Id.*) Thus, the Court finds that Plaintiff has failed to adequately allege with
14 any specificity how the *individual* Defendants would have known that there was a serious risk
15 of harm.

16 Accordingly, as currently plead, Plaintiff has failed to show that any Defendant acted with
17 conscious disregard to a risk to his safety. *See Farmer*, 511 U.S. at 837; *Johnson v. Duffy*, 588
18 F.2d 740, 743 (9th Cir. 1978) (to establish a deprivation of a constitutional right by any
19 particular individual, the plaintiff must allege that the individual, in acting or failing to act, was
20 the actual and proximate cause of his injury). Thus, Plaintiff’s Eighth Amendment failure to
21 protect claims are dismissed for failing to state a claim upon which relief can be granted.

22 In addition, Plaintiff alleges that Defendants were deliberately indifferent to his serious
23 medical needs in violation of his Eighth Amendment rights. (*See* FAC at 5.) Where an inmate’s
24 claim is one of inadequate medical care, the inmate must allege “acts or omissions sufficiently
25 harmful to evidence deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429
26 U.S. 97, 106 (1976). Such a claim has two elements: “the seriousness of the prisoner’s medical
27 need and the nature of the defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d
28 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d

1 1133, 1136 (9th Cir. 1997). A medical need is serious “if the failure to treat the prisoner’s
2 condition could result in further significant injury or the ‘unnecessary and wanton infliction of
3 pain.’” *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). Indications of a serious
4 medical need include “the presence of a medical condition that significantly affects an
5 individual’s daily activities.” *Id.* at 1059-60. By establishing the existence of a serious medical
6 need, an inmate satisfies the objective requirement for proving an Eighth Amendment violation.
7 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

8 In general, deliberate indifference may be shown when prison officials deny, delay, or
9 intentionally interfere with a prescribed course of medical treatment, or it may be shown by the
10 way in which prison medical officials provide necessary care. *Hutchinson v. United States*, 838
11 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said that a inmate’s civil rights have been
12 abridged with regard to medical care, however, “the indifference to his medical needs must be
13 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
14 cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing
15 *Estelle*, 429 U.S. at 105-06). *See also Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

16 Plaintiff’s only allegations consist of his claims that Defendant Sanchez refused to refill
17 a prescription for medication. (*See* FAC at 5.) There are no specific factual allegations as to the
18 nature of Plaintiff’s serious medical needs nor are there any allegations with regard to the type
19 of medication Plaintiff claims he should have been receiving. A mere difference of opinion
20 between an inmate and prison medical personnel regarding appropriate medical diagnosis and
21 treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d
22 240, 242 (9th Cir. 1989). Moreover, there are no allegations that Plaintiff suffered any physical
23 harm as a result of the alleged failure to receive this medication. *See Shapley v. Nevada Bd.*
24 *of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (a prisoner can make “no claim for
25 deliberate medical indifference unless the denial was harmful.”)

26 Thus, Plaintiff’s Eighth Amendment inadequate medical care claims are dismissed for
27 failing to state a claim upon which relief can be granted.

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1 In addition, to the extent Plaintiff seek to sue Defendants based merely on their
 2 supervisory positions, such allegations are insufficient to state a claim against these Defendants
 3 because there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*,
 4 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be
 5 individualized and focus on the duties and responsibilities of each individual defendant whose
 6 acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844
 7 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order
 8 to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual
 9 Defendant which have a direct causal connection to the constitutional violation at issue. *See*
 10 *Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th
 11 Cir. 1989).

12 Supervisory prison officials may only be held liable for the allegedly unconstitutional
 13 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
 14 extent they personally participated in or directed a subordinate’s actions, and (2) in either acting
 15 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff’s
 16 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
 17 however, Plaintiff’s First Amended Complaint fails to set forth facts which might be liberally
 18 construed to support an individualized constitutional claim against Defendant Neotti.

19 IV.

20 CONCLUSION AND ORDER

21 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

- 22 1. Plaintiff’s Motion to Appoint Counsel is **DENIED** [ECF No. 3] without prejudice;
- 23 2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is

24 **GRANTED.**

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3. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month's income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.


4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502, Sacramento, California 95814.

IT IS FURTHER ORDERED that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5. The Clerk of Court is directed to mail a court approved § 1983 form complaint to Plaintiff.

DATED: November 17, 2011



IRMA E. GONZALEZ, Chief Judge
United States District Court